cargo, but to say that the delay due to the stranding was a "short period" is wholly untenable, for delay is a relative term, and a delay about six days longer than the normal voyage time of four days cannot be regarded as a short period, nor can it be said that the vessel was not damaged, as the case stands, nor that she did not depart from the course of her regular voyage, for her grounding negatives that contention. It is, of course, absurd to unqualifiedly state, in view of our briefs, that it is not suggested the cargo suffered any damage except as a result of its own inherent vice.

As has heretofore been stated and reiterated the only question in this case is a question of law, viz. whether the general clause of the marine cargo insurance policy here involved insuring for loss caused by perils of the sea, covers a loss where a marine peril, viz. *stranding,* has caused the loss of the cargo of fruit by so delaying the voyage that the cargo has become a total loss.

The declaration filed herein (R. pp. 1-2) and the District Court's opinion (R. p. 17) fully and sufficiently cover that point and put before this court the question here involved.

But, in view of the fact that respondent attempts to make something of this point, we feel that if this court felt there was anything in it, it would, to do substantial justice, remand the case with directions that petitioner be permitted to amend its declaration if it is not sufficienly specific.

All the questions raised under this phase of the case by respondent could, in any event, only be passed upon after all the evidence was in, on proper instructions by the trial court.

The court will bear in mind that we have never had an opportunity to present evidence in support of our case.

We feel that in view of the fact that the respondent has so strongly urged this point in this court, (which was not raised in either court below), that the court should know the facts as to which petitioner would adduce proof in support of its declaration on the trial of the case.

The Smaragd loaded her usual cargo of bananas at Cuba and stranded just outside of Baltimore (which became her port of refuge when floated) and remained aground for about a week despite repeated efforts to float her. (See petitioner's reply brief on Certiorari, p. 2.)

Finally, the fruit rotted and became a total loss, had to be discharged from the vessel on to lighters and from them dumped. The respondent knew these facts from their representatives who were aboard after her grounding and from reports given to them by Petitioner. The vessel later was floated, came to Baltimore, *without* its cargo, and was drydocked for survey and any repairs found necessary.

To suggest that the voyage was not frustrated by this stranding is wholly untenable in the light of these facts, all of which will be shown at the trial. The voyage of the Smaragd was to bring a cargo of bananas to Baltimore, which she failed to do because she stranded and the cargo had to be taken off on account of the stranding and became a total loss, and the vessel therefore never brought her cargo into port. What could be more a frustration of a voyage?

The question, therefore, clearly before this court is to determine whether the British or American rule of *proximate cause* relating to marine cargo insurance policies is to be applied.

This case cannot be distinguished from *Brandyce, et al., vs. U. S. Lloyds, Inc.*, 207 App. Div. 665, 203 N. Y. Supp. 10, affirmed *per curiam*, 239 N. Y. 573, 147 N. E. 201, and the cases therein cited in support thereof, and *no attempt was made to do so by respondent in the two lower courts.* Their argument there consisted entirely of the proposition that the British rule was more logical and was supported by *Perry vs. Cobb* and *Cory vs. Boylston Ins. Co.*

As heretofore stated the question in this case comes down to whether the stranding alleged in the declaration was the proximate cause of the loss of the cargo of bananas. We subscribe to the proposition that ordinary delay in a voyage causing the cargo to deteriorate is not covered by a policy such as in this case, but where deterioration is brought into operation by a cause insured against, such as here, viz. stranding, it has been held by the American authorities to be covered, *as one of the perils insured against was the proximate cause of the loss.* (See Petitioner's Brief in Support of Petition for Writ of Certiorari, pp. 16-35.)

At page 13, respondent quotes from Winter on Marine Insurance, 2nd Ed., p. 97, but significantly fails to carry the quotation for six further lines, which we here supply:

> "A recent decision in New York, while confirming this general rule, held that where the *delay* resulted from a marine peril and, as a consequence of such delay, deterioration commenced, the underwriter was liable for the resultant loss, the *proximate cause of the loss being the marine peril and not the delay.*"

The respondent's argument on pp. 13 and 14 puts forth supposititious cases, none of which apply to the facts here, and in any event could only be *fairly* argued after the evidence was in. In addition it puts forward propositions which would necessarily be affirmative defenses on its part and which it could only sustain after they had produced evidence in their support.

The argument of respondent as to sea perils "successfully overcome" is clearly not in point. How can it be argued that the sea peril was successfully overcome when the vessel's voyage was not completed and the bananas not delivered at destination—because of the stranding?

The argument is wholly inapplicable to the case at bar. The stranding here actually occurred and is so alleged in the declaration. How an argument can be made on the basis of a sea peril "successfully overcome" which peril caused the cargo's total loss, is difficult to appreciate. *Jordon vs. Warren Ins. Co.*, 1 Story 342, cited in support of this argument is clearly inapplicable. The Respondent then says:

> "If the damage in this case had been directly due to a sea peril, that is, if the ship had sunk or burned or sea water had injured the cargo, the underwriter would unquestionably be liable, but where the cargo suffered no physical damage through any peril of the sea there is no liability."

That is just what happened in this case, a sea peril, viz., *stranding* caused this cargo of bananas to be destroyed, and clearly sustains Petitioner's contention. The loss of the fruit was directly due to *this* peril of the sea.

Certainly, Mr. Justice Story in the Jordon-Warren case did not change the rule he laid down in ***Magoun vs. Ins.***

*Co.* fully referred to and quoted from in petitioner's brief in support of petition for writ of certiorari at pp. 27-29.

*Bond vs. The Superb,* 3 Fed. Cas. 845, cited at p. 9 and quoted from at p. 23 of respondent's brief, was a general average case and had nothing to do with a suit on an insurance policy. In that case the Superb, while on a voyage from Palermo to Philadelphia, had been obliged by bad weather to put into the port of St. Thomas. Part of her cargo, which consisted of fruit, was discharged at St. Thomas for the purpose of making repairs, but was afterward reloaded. On arrival at Philadelphia it was found that the fruit was rotten. According to the evidence it had apparently begun to rot even before arrival at St. Thomas. The owners of the fruit brought suit against the ship on some theory that the discharge at St. Thomas entitled them to claim all of the damage in general average. We are at a loss to see how this case, which rests on principles of general average, and not on the terms of a contract of insurance, bears on the case at bar.

And the case of *The Casey,* 30 Fed. (2nd) 136, cited, at p. 9 and quoted from at p. 24, was also a general average case, and was decided on the law as applying to general average and not on an insurance contract. In that case Judge Woolsey indicates that as to a contract of insurance *The Corsicanna,* supra, was properly decided. (See quotation therefrom p. 35, Brief in Support of Petition for Certiorari.)

The quotation on p. 11 of respondent's brief from Arnould on Marine Insurance, an *English* publication, 11th Ed. (1924) Sec. 778, is based entirely on the British cases of *Taylor vs. Dunbar* and *Pink vs. Fleming,*

fully discussed in our brief in support of petition for certiorari (pp. 10, 11, 20), and shown not to be applicable here.

At p. 12 of respondent's brief it quotes from 1 Phillips on Insurance, Sec. 1134, where, after stating that the

> "* * * assured must bear the loss arising from the qualities of the article insured, *without any direct action of the perils insured against,* * * *".

the quotation continues:

> "Accordingly, where a vessel was compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, which were liable to be spoiled by the heat of the climate, were necessarily sold. The loss was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for the loss. The loss arose from the action of the climate on the articles, and as this was a damage at the risk of the assured, he was not the less liable for it because it had been indirectly and incidentally aggravated by the delay occasioned by the perils of the seas which were insured against."

This quotation might be of some assistance to the respondent were it not obviously based on an entire misapprehension by its author.

The decision cited as authority by Phillips for the above statement is *Goold v. Shaw,* 1 Johns Cas. 293. In that case the action was not brought, as *supposed* by Phillips, on a policy covering *the cargo,* but on a policy covering *the ship.*

The facts were that the plaintiffs had insured *the ship* Astrea from New York to certain ports in the East Indies, with liberty to touch at several intermediate places, the risk to continue until the vessel's return to New York.

Shortly after the Astrea sailed she was overtaken by a violent storm and her master was obliged to put into Martinique as a port of refuge. The cargo, a large part of which consisted of claret and porter, was discharged on the beach in order to repair the ship. Owing to the heat of the climate and the necessity of exposing the claret and porter to the sun it was deemed advisable to sell it. After the completion of the repairs, which were made at a comparatively small cost, the Astrea returned to New York, inasmuch as the loss of the claret and porter made the continuation of her voyage to the East Indies an unprofitable one.

The suit, as has been stated, was brought on a policy covering the hull of *the ship,* and had nothing to do with insurance on the cargo, which cargo may or may not have been insured. Incidentally, judgment was given for the underwriters by an almost evenly divided court, Kent, J., (who wrote the opinion in Williams v. Smith, our brief in support of petition for certiorari pp. 10, 11, 18), giving the deciding vote in favor of the underwriters.

Radcliffe, J., who delivered the principal judgment in favor of the underwriters, pointed out that

> "although the same dangers await them (the subjects of insurance), they are considered as distinct and independent of each other, and liable to different results. * * * the freight and cargo, or either, may be wholly lost, and the ship saved * * *" (1 Johns Cas. at p. 295).

The grounds of the judgment of Mr. Justice Kent were that, inasmuch as the damage to the hull was but slight, and, as the sale of the wine did not defeat the object of the voyage, the underwriters could not be held liable for a total loss of the ship. He said.

> "But the weight of evidence is, that the ship was not so injured as to be worth less than half of her value. It appears that she might have been repaired for one-fifth of her value, and that she was actually repaired and returned from Martinique to New York. The sale of the liquor, admitting the sale to have been a direct and necessary consequence of one of the perils in the policy, ought not to be considered as defeating the voyage. The liquors constituted only a small freight for a ship of 400 tons, and a principal object of the voyage must have been the homeward freight from the East Indies.
>
> "* * * Neither the subject insured nor the voyage was lost. And, indeed, I think it is a question (though not necessary now to be discussed and decided) whether on a policy on a ship, the insured can abandon while the ship is safe, in consequence of the loss of cargo, and whether the true rule of law be not that the subject insured must be either actually lost or so injured as thereby to occasion a loss of the voyage before it can be abandoned." (1 Johns Cas. at pp. 308-309).

*It is plainly evident from the language used by Mr. Justice Kent that he considered that there was a total loss of cargo for which its underwriters would be liable.*

The very fact that the decision was such a close one shows that it was practically conceded by the underwriters that the loss of the claret and porter was proximately due to sea perils, and that their only grounds of defense were either that there was no loss of the ven-

ture, or else that the loss of the venture did not entitle the insured to recover on a *hull* policy.

The statement of Phillips, therefore, is founded on a wholly erroneous reading of the decision on which it is based. The *quotation, relied on by respondent,* is accordingly entitled to no weight as authority.

This case, as also the cases of *Williams vs. Smith,* 2 Caines Rep. 1, and *Tudor vs. New England Ins. Co.,* 12 Cush. (Mass.) 554, are the authority for Lord Esher's statement in *Pink vs. Fleming,* L. R. 25, Q. B. D. 396, quoted on p. 23 of our brief on our Petition for Certiorari.

The argument at page 20 of respondent's brief that the question here involved is not one of causation, but coverage is another attempt to confuse the issue. Certainly, we agree that the question is one of coverage, but the coverage is to be determined by the question of causation. That is the only reason for the difference between the cases decided by the British Courts and those decided by the American Courts, the British Courts holding that the last cause in point of time is the proximate cause, whereas the American Courts hold that the proximate cause is the *efficient* cause, in this case stranding, which brought about the delay and subsequent rotting of the fruit, and as that was one of the perils insured against under the General Clause, the insurer-respondent must answer. To suggest that the question here is not one of causation is simply untenable when the authorities, both on behalf of the petitioner and respondent, are considered. It is clearly a case of causation determining the coverage!

The decisions in Massachusetts and Maine put forward as authorities in support of respondent's contention (pp. 21-23) are clearly inapplicable.

(See argument in Petitioner's Brief on Certiorari, pp. 36-39.)

*Taylor vs. Dunbar* and *Pink vs. Fleming*, the British cases strongly relied on by the respondent, lay down the British rule, which we submit is contrary to the American rule. However, *Taylor vs. Dunbar* simply illustrates the rule that mere delay is not covered by the general clause of a marine cargo insurance policy. (See also Petitioner's Brief on Certiorari, pp. 10-12.)

*Pink vs. Fleming*, however, was decided, professedly, without reference to the American authorities, and has been criticized in other decisions (Petitioner's Brief on Certiorari, pp. 16-30). It, furthermore, is illogical, and at variance with the *Leyland* case in the House of Lords. (See Petitioner's Brief on Certiorari, pp. 11 and 20.)

*The Alps*, L. R. 1893 Probate Div. 109, might well have been cited in the petitioner's brief, inasmuch as the court there held that the plaintiff was entitled to recover a loss of freight due to delay.

*Reischer vs. Borwick*, L. R. 1894, 2 Q. B. 548, had to do with a claim on a hull policy, the question before the court being whether the proximate cause of the loss was a collision or the failure of the insured to make proper temporary repairs. It has no application to the present case.

*Inman Steamship Co. vs. Bischoff*, L. R. 7 A. C. 670, resembles *The Alps; supra*, except that in *Inman vs. Bischoff*, the court held that the loss of time freight,

which the plaintiffs sought to recover from their freight underwriters, was due to an option given the Portuguese Government (the charterers) to make a deduction from hire in case the ship became inefficient. This case also has nothing to do with a claim under a cargo policy.

That the proximate cause rule, as relating to marine cargo insurance policies in America, is contrary to the rule laid down in England by *Pink vs. Fleming,* is exemplified by the case of *Muller vs. Globe & Rutgers Fire Ins. Co.* (C. C. A. 2), 246 Fed. 759, wherein at page 762, Judge Hough, speaking for the court, said:

> "But the problem still remains whether the Canadia's loss was proximately due to sea peril, and solution primarily depends on the meaning of 'proximate', as construed by judicial commentators. *That cause is proximate which sets the other causes in motion;* only when causes are independent is the nearest in time looked to. Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, a case whose facts are instructive and interesting. *If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proximate cause of injury, unless it is efficient to break the causal connection* (Milwaukee, etc., R. R. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256)".

It would seem, therefore, that the American courts have adopted the logical rule as to the doctrine of proximate cause relating to marine insurance policies, and not the strained and illogical rule laid down in *Pink vs. Fleming,* which has *never been approved by any American court,* and expressly *disapproved* in The Corsicana case *supra.*

**THE RIDER.**

The policy was dated June 23, 1933. The rider in question was dated April 4, 1934 and was cancelled on January 25, 1935, as of January 16, 1935 (R. pp. 13-14). The stranding was on July 21, 1935 and, therefore, at a time when the rider of April 4, 1934 was not a part of the policy.

There are numerous reasons why this rider has not the most remote bearing on the issue here involved. Amongst them are these:

1. The rider, by its terms, had *solely* to do with *partial* loss (particular average) coverage—whereas, the claim here is *solely* for a *total* loss under the general policy clause (R. pp. 15-16; 3-4; and Brief on Certiorari, pp. 39-40).

2. No *intent* of the parties, as to the scope of the coverage under the general policy clause, dated June 23, 1933, can be deduced from the language of this rider, as not *in existence* until attached on April 4, 1934, and deleted by cancellation *before* July 21, 1935, the date of the stranding (R. pp. 8; 15-16; 13-14, and Brief on Certiorari, p. 43, par. 4).

The District Court decided this issue by accepting the language of the cancelled rider, as indicative of an intent not to cover this type of loss when the rider had only to do with partial loss provisions and the claim here was for a total loss under the general coverage clause.

The basic error of that holding is found in the fact that you certainly cannot deduce intent as to the coverage of the original general, or total loss, clause of the policy issued in June, 1933, from the provisions of a

partial loss clause added to the policy nearly a year thereafter. So there was not only misinterpretation of what the language of the partial loss clause provided, but there was distinct impropriety in considering it at all as indicative of an intent, or the meeting of the minds of the parties, nearly a year before the rider was attached.

3. It is patently improper and indeed impossible to construe an earlier clause by a later clause, when one deals solely with one type of coverage and the other solely with another, and the latter makes no reference whatever to the former (Brief on Certiorari, p. 40, par. 1, and p. 43, par. 3).

(4) It is manifestly impossible to alter a general policy clause by a special policy clause without employing specific and unequivocal language so indicating—and improper so to attempt (Brief on Certiorari, p. 43, par. 3).

(5) No change in a policy clause coverage can be made such as its enlargement, modification or restriction, by inference or implication (Brief on Certiorari, p. 43, par. 3).

When, at the argument in the Circuit Court of Appeals, petitioner pointed out that the rider had solely to do with particular average (*id est* partial loss claims), respondent's counsel admitted the fact and contended that it only "*by inference*" changed the general coverage clause, whereas below they had vigorously argued that it unequivocally covered total loss claims.

(6) No such rider could be taken as "conclusive" of contractual intent under the general policy clause (sued on), as held by District Judge Coleman, when he found

the latter ambiguous and held (quite correctly—*if* ambiguous) that the language of the policy

> "* * * permitted, in fact called for, a consideration of *everything* that had gone *before*,"

for this rider was attached nearly a year *after* the event (R. p. 15).

The propriety of the Court's finding is therefore negatived by its own ruling.

It is also pertinent to note that *if* the general coverage clause was ambiguous and *everything* that had gone before should have been considered that, in point of fact, *nothing* was considered that had gone *before!*

Furthermore, the District Judge placed his ruling squarely on the rider, ignoring the law of his land, whose Courts had met the issue squarely, and had held that the general clause sued on fully covered the claim here made (The Corsicana, *Brandyce vs. U. S. Lloyds, supra*).

And finally as the rider *only* attached, long *after* the event, and made no reference to the general clause sued on, it was patently irrelevant and inadmissible as evidence (R. pp. 22-3), but, even if admissible, would throw no light, under the facts, on the *intent* of the parties when the policy was *first* issued (Brief on Certiorari, p. 41, par. 4, and p. 42, par. 1, R. pp. 16, 22-3).

(7) The rider (dealing *only* with partial loss contingencies) expressly stipulated, on its face, that—

> "All other terms and conditions remain unchanged" (R. p. 16, and Brief on Certiorari, p. 40, par. 1).

So that manifestly the total loss coverage under the general clause remained unaffected.

(8) This rider's cancellation clause specifically provided that—

> "Thereafter this policy covers the same *as prior* to the attachment of said endorsement" (R. p. 13-14, and Brief on Certiorari, p. 40).

The sole question, an issue of law, therefore is "What was the coverage under the general policy clause *'prior* to the attachment of said endorsement' ", and the American law is indisputably that Plaintiff-Petitioner is entitled to recover for the total loss of its fruit cargo, since its *proximate* cause was the vessel's stranding (sea peril) causing delay which caused it to rot and become a total loss (The argument, supra, and that in our Brief on Certiorari, p. 40, fully covers this point).

Certainly the lengthy and complicated argument of astute counsel on pages 30 to 38 of their brief in their discussion of this point, is more conclusive of the fact that there was never any such meeting of the minds of Tony Lanasa, the president of petitioner's company, and the underwriters' agent, than that there was, and that, therefore, no "intent" could be deduced, therefrom, even "*by inference,*" since counsel's laborious endeavors, in an elaborately refined argument, to develop this intent is not persuasive that any such intent was considered, or indicated, by the parties, when the rider made no reference, specific or otherwise, to total loss claims. The argument defeats itself.

Furthermore, the change of position by counsel above from the position they took below as to what the rider's coverage actually was, makes it (in their viewpoint) an ambiguous rider and it would be manifestly improper

by the application of such a rider to the general coverage clause to change its provisions, since the language of that specific clause has been judicially adjudicated in *The Corsicanna* case to be *un*ambiguous and to cover the total loss here sued for.

In the District Court, they vigorously contended that the rider unequivocally covered total loss claims, but in the Circuit Court of Appeals that it only did so by inference. This change of position was taken after petitioner's counsel had called the court's attention to the fact that the rider dealt exclusively with particular average. The rider, therefore, did not cover specifically, unequivocally or even inferentially, total loss claims and the contention that the intent of the parties was so to cover total loss claims is wholly illogical on the face of the two clauses wholly aside from the interpretation of the general coverage clause by the American Courts.

It certainly cannot be contended, with any seriousness, by the respondent that the rider changed their legal obligation under the general clause.

The rider, as also appears, contained provisions regarding insurance under the breakdown clause, as solely applicable to partial losses, and as heretofore shown, was placed on the policy actually some ten months after the policy, *with the general clause,* was issued. If the loss here was covered under the general clause in accordance with the law heretofore argued in this brief, and in the brief on certiorari, certainly language that even counsel was not certain of, as shown by their different contentions, could not take away the vested rights of the petitioner under the general clause.

If the respondent had not intended to originally insure the petitioner for a loss, such as suffered here, in accordance with the American law, where the contract was made, but intended to be governed by the decision of the British Court in *Pink v. Fleming* and the Merchant Marine Insurance Act of England, the only way it should be permitted to do so is by clear, unmistakable and unequivocal language, showing its intention not to be bound by the American law, and not be permitted to argue inference on inference, as they do, to defeat the petitioner's rights under the general clause, as construed by the American courts.

There certainly can be no ambiguity in a clause which has been specifically construed by courts of high authority as has this clause in America. The only ambiguities, here present, are in the varying interpretations of *the rider* by respondent's counsel, and the relevancy of its application, *if* it had *not* been cancelled to construe an *un*ambiguous general clause is clearly negatived.

If respondent desired to limit its liability under the general clause, it should have had the commercial courage to say so plainly and openly in its policy as was done in *Fireman's Fund Insurance Co. v. Trojan Powder Co.*, 253 Fed. 305, wherein a clause provided:

> "Warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise."

The authorities cited by the respondent on this point are not applicable to the facts here. In none of them was there a provision of a contract which had theretofore been judicially construed, as is the case here, and, therefore, in this case the general clause did not have

to be construed by the conduct of the parties. This policy was to be interpreted in accordance with existing judicial decisions as to the law, and it was, therefore, not necessary to look further.

*Mercantile Trust Co. vs. Columbus Water Works,* 161 Fed. 135.

As the general clause was not ambiguous, having years before the execution of this policy, been judicially construed by courts of high authority, the conduct of the parties, even if contrary to the terms of the contract, does not affect its terms.

*Fairfield vs. Lowrey,* 207 Mass. 358, 93 N. E. 598.

What we have here said, as also what we said in our Brief on Certiorari, fully covers and answers respondent's argument on this point, but we add, in conclusion, that it would be against all reason and logic to permit this respondent to relieve itself of an obligation under the general clause, for which the petitioner has *paid, "as agreed"* (R. p. 4), by construing a partial loss rider, having nothing to do with a total loss, placed on the policy nearly a year after it had been in force, and when unquestionably, if the American law is applicable, the petitioner would be covered. Certainly that rider could not reduce or restrict the coverage under the general clause, and if the general clause covered before the rider attached it also covered after the rider was cancelled, and is clearly out of the case.

The refined reasoning of the respondent employed to make this partial loss breakdown clause rider hark back to the general clause and take away adjudicated

rights of the petitioner thereunder, surely cannot be accepted when regard is had for the familiar rule that policy terms are to be strictly construed against the insurer who begets them, as also the rule applicable to insurance policies that coverage cannot be reduced or curtailed, unless it is done by specific, unmistakable and unequivocal language.

## CONCLUSION.

The judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland, should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

Dated, December 8th, 1937.

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